Filed 12/28/04 Estate of Feder CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

Estate of PETER F. FEDER, Deceased.	B168727 (Los Angeles County Super. Ct. No. LP005023)
JOSHUA FEDER, Petitioner and Respondent, v. CARYN ESPO FEDER, Claimant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard G. Kolostian, Judge. Reversed with directions.

Kehr, Schiff & Crane, Joel P. Schiff, Paul N. Crane and Christine S. Upton for Claimant and Appellant.

Gerald I. Neiter for Petitioner and Respondent.

INTRODUCTION

In this proceeding to determine rights under the will of decedent Peter F. Feder (Peter), Caryn Espo Feder (Caryn), the decedent's widow, appeals from the adverse judgment entered after the court granted the motion for summary judgment filed by Joshua Feder (Joshua), a son of decedent's prior marriage, and denied Caryn's motion for summary judgment. The judgment decreed that Caryn was not entitled to a specific bequest in the amount of $200,000 contained in Peter's will, that Caryn take nothing under the will, and that the specific bequest be transferred to and be distributed as part of the residue of the estate, which Peter left to the children of his prior marriage. We reverse with directions.

FACTS

Peter and Caryn were married on May 28, 1989. At the time, Peter had four adult children from a previous marriage.

On May 16, 1989, prior to their marriage, Peter and Caryn executed a prenuptial agreement for a term of 10 years. With the exception of community property, Peter and Caryn mutually agreed to waive the right to inherit from the estate of the other, except pursuant to a will executed after the effective date of the prenuptial agreement. The agreement further evidenced the couple's intention to construct a family residence at 3827 Buena Park Drive in Studio City, which was to be held as community property. Upon the future sale of the property, the parties were to divide the net proceeds equally. On June 16, Peter and Caryn took title to the Buena Park property, then an unimproved parcel of real property, as community property.

On July 11, 1990, while the family home was under construction, Peter executed a will. Peter made only one provision for Caryn. He provided, "Upon my death I hereby make the following specific bequest: [¶] A. The sum of $200,000 to my wife, CARYN ESPO FEDER, for the purpose of paying off the mortgage obligations on our family

residence located at 3827 Buena Park Drive, Studio City, California." Peter left the reside of his estate to his four children—Daniel Louis Feder (Daniel), Mara Lynn Feder, Joshua and Jacob Seth Feder—in equal shares or to the survivors.

In February 1991, Peter and Caryn moved into their Buena Park residence. On September 16, 1991, they recorded a first trust deed encumbering the property to secure a refinance loan in the amount of $650,000.

On August 6, 1996, Peter and Caryn entered into a written contract to sell their Buena Park residence for $785,000. Escrow, which was opened the same day, was scheduled to close on September 20. On August 22, while the sale was still pending, Peter died.

On October 29, 1996, more than one month after escrow was scheduled to close and more than two months after Peter's death, escrow closed. Between Peter's death and the close of escrow, neither Caryn nor the probate estate paid the mortgage on the Buena Park property. The indebtedness secured by the deed of trust recorded on September 16, 1991 was discharged with the proceeds of the sale of the property. The remaining indebtedness at the time of Peter's death was $624,000. The net proceeds of the sale, approximately $95,000, were divided equally between Caryn and Peter's estate.

PROCEDURAL BACKGROUND

On September 5, 1996, Daniel filed a petition for probate of Peter's will and for letters testamentary. On September 16, 1996, the probate court appointed Daniel special administrator of Peter's estate so that the sale of the Buena Park property could be completed. On November 26, the court appointed Daniel executor of Peter's estate and issued him letters testamentary.

On November 21, 2001, Joshua filed a petition to determine distribution of rights. Joshua maintained that Caryn was not entitled to the $200,000 referenced in Article Sixth of his father's will "inasmuch as the bequest . . . was for a specific purpose, and was not

used for such purpose since the purpose failed before the bequest could be so used." Joshua sought an order that Caryn was entitled to nothing under his father's will.

On August 9, 2002, Caryn filed a motion for summary judgment or summary adjudication in which she asserted that "she [was] entitled to receive the gift in Article Sixth of Decedent's Will." The same day, Joshua filed a motion for summary judgment. Joshua argued that the bequest in Article Sixth of his father's will failed, in that Peter and Caryn had entered into an escrow to sell their Buena Park residence and the outstanding mortgage had been paid directly from the sale proceeds. Caryn and Joshua lodged numerous objections to each other's evidence.

At the hearing on the motions, Caryn's attorney expressly requested the court to make evidentiary rulings on the objections that had been made. Joshua's counsel joined in the request. The court refused to rule on the objections. Acknowledging "there is a flock of [objections] here," the court stated, "I am not about to go down, one, two, three, four, five. The court only considers admissible evidence and excludes inadmissible evidence." The court then granted Joshua's motion and denied Caryn's. In granting Joshua's motion, the court noted that "everything is clear," concluding there was no triable issue of fact, in that "paragraph 6 clearly, unambiguously expresses [Peter's] intent" that the $200,000 bequest to Caryn was a limited one.

In its written order, the court concluded that Joshua was entitled to judgment as a matter of law "for the following reasons: (1) the $200,000 bequest was strictly limited to be used by [Caryn] in making payments on the Buena Park mortgage, (2) none of the bequest was spent on the mortgage, (3) the bequest was not precatory, (4) [Peter's] intent was that if the bequest was not spent on the mortgage, it was not to be spent at all, (5) Article Sixth of decedent's Will constitutes a mandatory requirement, not a mere request, recommendation, or suggestion, (6) [Peter's] expressed intention at Article Sixth should be carried out, namely, that the $200,000 bequest be used to pay off the mortgage, and not for any other purpose, and (7) since the bequest was designed for a specific purpose, if it was not so used, the money should be forfeited and returned to the residuary beneficiaries."

On June 18, 2003, judgment was entered against Caryn and in favor of Joshua. The judgment decreed that Caryn take nothing under Peter's will and that the specific bequest be distributed as part of the residue of Peter's estate.

CONTENTIONS

Caryn contends (1) the undisputed facts establish her right to the specific bequest of $200,000 as a matter of law; (2) Peter's intent, ascertained from the language of his will, was to make a precatory bequest; (3) the trial court erred in finding the language was mandatory by relying on extrinsic evidence to determine the testator's intent, in that the extrinsic evidence raises a question of fact, not capable of summary adjudication; (4) there is no evidence to support a determination that Peter intended that this gift be adeemed if the residence was in escrow at the time of his death; and (5) her gift is not reduced because of the community property nature of the obligation. For the reasons that follow, we reverse the judgment and direct entry of judgment for Caryn in the amount of $200,000.

DISCUSSION

Before we turn to the merits of Caryn's contentions, we address the trial court's refusal to rule on the specific evidentiary objections interposed by the parties and its decision to make a blanket ruling that it would consider admissible evidence and disregard inadmissible evidence.[1] This type of ruling has been criticized strongly. As noted in *Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, "it is not the function of an appellate court to make such evidentiary rulings in the first instance." (At p. 235.) "[I]n the summary judgment context, '[t]rial courts have a duty to rule on evidentiary

[1] This practice was approved in *Biljac Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 1410, 1419.

objections.' [Citation.] When that duty is not performed, appellate courts are left with the nebulous task of determining whether the ruling that was purportedly made was within the authority and discretion of the trial court and was correct. In our view, it was error for the trial court to omit to perform its duty to rule on evidentiary objections." (*Ibid*.)

In *Vineyard Springs Estates v. Superior Court* (2004) 120 Cal.App.4th 633, the appellate court issued a writ of mandate directing the trial court to vacate its order denying petitioner's motion for summary judgment, to rule on the evidentiary objections made by petitioner below and to reconsider the motion in light of the objections. In so doing, the appellate court stated, "It is imperative that a trial court rule on evidentiary objections regardless of whether the motion is denied or granted. A trial court cannot decide whether a motion should be denied or granted until it has first determined what admissible evidence is in play on the motion. Moreover, when a trial court fails to rule on summary judgment evidentiary objections, the objections are ordinarily deemed waived on appeal, and the appellate court will consider the objected-to evidence in reviewing the ruling on the motion. [Citations.] This is a bitter pill for a party who has tendered valid objections." (At pp. 642-643.)

At the hearing in this matter, Caryn asked the court to rule on her evidentiary objections thereby preserving her objections for appellate review. (*City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal.App.4th 780, 783.) Joshua joined in the request. The court refused to rule on the "flock" of objections that had been raised, stating, instead, that it would consider only admissible evidence. As noted in *Sambrano*, "it was error for the trial court to omit to perform its duty to rule on evidentiary objections." (*Sambrano v. City of San Diego*, *supra*, 94 Cal.App.4th at p. 235.)

Although we agree with the sentiments expressed by the courts in *Sambrano* and *Vineyard Springs Estates*, we find it unnecessary to send this case back to the trial court to reconsider the motions anew after expressly ruling on the parties' evidentiary objections. As we now explain, Article Sixth of Peter's will is unambiguous and resort to

extrinsic evidence is unnecessary to ascertain Peter's intent. The parties' evidentiary objections consequently need not be addressed.

A will must be construed in light of the testator's intent as expressed therein. (Prob. Code, § 21102, subd. (a).) To the extent permitted by law, extrinsic evidence may be used to ascertain the testator's intent. (*Id*., subd. (c).) "The interpretation of a will . . . presents a question of law unless interpretation turns on the credibility of extrinsic evidence or a conflict therein." (*Burch v. George* (1994) 7 Cal.4th 246, 254.)

In this case, the trial court concluded that Article Sixth of Peter's will was unambiguous and that it imposed a mandatory duty on Caryn to use the money to pay the couple's mortgage obligations. We agree, in that it does not contain any language that can be characterized as precatory—i.e., words expressing the testator's desire, hope, wish, recommendation or request and giving the beneficiary discretion. (*Estate of Sloan* (1935) 7 Cal.App.2d 319, 341.) The language used by Peter in his will leaves no doubt that his $200,000 bequest imposed on Caryn the mandatory duty to use the funds solely to pay off or down the couple's mortgage obligation on the family residence.

Unlike the trial court, however, we conclude, as a matter of law that Caryn is entitled to inherit under Peter's will. In reaching this conclusion, we gauge Caryn's entitlement to Peter's bequest by the circumstances in existence on the date of Peter's death. When Peter died, the mortgage on the Buena Park property remained outstanding. Neither the pendency of the sale, the absence of mortgage payments made during the pendency of the sale, nor Caryn's failure to request a distribution during escrow negates these facts.

Until the escrow closed, the mortgage obligation on the Buena Park property remained. Surely, if the sale had fallen through after Peter's death and escrow been cancelled, there is no question that Caryn would have been entitled to the money. The result should not be different simply because escrow closed successfully after Peter's death.

That there currently is no mortgage to pay off is irrelevant. Inasmuch as Peter's gift to Caryn vested on the day of his death subject to administration (Prob. Code, § 7000;

Noble v. Beach (1942) 21 Cal.2d 91, 94), any holdup in the distribution of the bequest by virtue of the delays inherent in the probate and administration of Peter's estate to a date following the closing of escrow could not cause the gift to fail. The question remaining is how to put Caryn in the position she would have been in had the $200,000 been available to her to pay the mortgage.

Caryn asserts that she is entitled to $200,000 from Peter's estate. Joshua, on the other hand, asserts that under the best-case scenario, Caryn would have benefited by only $100,000. More specifically, Joshua asserts that if the $200,000 bequest had been paid toward the mortgage, the equity in the property would have increased by $200,000. Inasmuch as Caryn would have been entitled to only one-half of the net proceeds, she would have benefited by $100,000, with the remaining $100,000 going to Peter's estate.

The scenario posed by Joshua would result in an unintended windfall to Peter's children. In his will, Peter bequeathed $200,000 directly to Caryn to pay the mortgage. Peter left the residue of his estate, which included his community property share in the Buena Park property, to his four children. Thus, Peter knew that upon his death, Caryn would own the Buena Park property in common with his children. If it had been Peter's intent to benefit all the future cotenants of the property, he simply could have directed the administrator of his estate to take $200,000 of his separate property and pay down the mortgage. He did not do so, however. Rather, he bequeathed money directly to Caryn, evidencing his intent that only she benefit from the bequest.

In *Southern Adjustment Bureau v. Nelson* (1964) 230 Cal.App.2d 539, the plaintiff and defendant each owned an undivided one-half interest in real property as tenants in common. Plaintiff, who "had advanced $2,516 to pay taxes, insurance and trust deed payments to preserve the common property," sued to quiet title and partition the property. (At p. 539.)

The trial court ordered the property sold and the proceeds distributed. The court further determined that plaintiff was entitled to be reimbursed for its contribution. The original judgment directed that plaintiff be paid $2,516 from the proceeds of the sale. An amended judgment, however, provided that plaintiff be paid $1,258, representing one-

half of the advances it made together with interest, prior to distribution of the proceeds. (*Southern Adjustment Bureau v. Nelson*, *supra*, 230 Cal.App.2d at p. 540.)

On appeal, the appellate court held that the original judgment had been correct and noted that the method of reimbursement provided for in the amended judgment gave the reimbursing cotenant a monetary "advantage." The court observed, "When a cotenant makes advances from his own pocket to preserve the common estate, his investment in the property increases by the entire amount advanced. Upon sale of the estate he is entitled to be reimbursed his entire advancement before the balance is equally divided." (*Southern Adjustment Bureau v. Nelson*, *supra*, 230 Cal.App.2d at p. 541.)

Despite the factual differences between *Southern Adjustment* and this case, we believe the principles espoused in *Southern Adjustment* apply equally in this case. Upon Peter's death, one-half of the Buena Park property belonged to Caryn. The remaining half belonged to Peter's estate. (Prob. Code, § 100, subd. (a); *Estate of Petersen* (1994) 28 Cal.App.4th 1742, 1746.) In his will, Peter bequeathed the remainder of his estate, which included his community property interest in the Buena Park property, to his children. Their interest in the property vested upon Peter's death as well subject to administration. (*Noble v. Beach*, *supra*, 21 Cal.2d at p. 94.)

The $200,000 that Peter bequeathed to Caryn was her separate property. Absent the delays in the administration of Peter's estate, Caryn would have been able to use this separate property bequest to pay down the existing mortgage on property she now owned in common with Peter's children. At the close of escrow, instead of $95,000, the net proceeds of the sale would have totaled $295,000. Inasmuch as Caryn would have advanced $200,000 of her own money to pay the mortgage on property she now owned in common with Peter's children, she would have been entitled to a reimbursement of this amount prior to distribution of the remaining proceeds. We therefore conclude that Caryn is entitled to receive the $200,000 from Peter's estate. Receipt of this money will put her in same position she would have been in had the money been available to her to make the mortgage payment mandated by Peter's will.

The judgment is reversed. The trial court is directed to vacate the judgment and enter judgment anew in favor of Caryn in the amount of $200,000. Caryn is awarded her costs on appeal.

NOT TO BE PUBLISHED

SPENCER, P.J.

We concur:

VOGEL, J.

SUZUKAWA, J.*

* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.